89-878

Supreme Court, U.S.
FILED
DEC 4 1989
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NO. 89-.....

IN THE

Supreme Court of the United States

October Term, 1989

JOHN R. KNIGHT,

Petitioner,

v.

UNITED STATES CENTRAL INTELLIGENCE AGENCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 4, 1989

QUESTIONS PRESENTED

1. Whether determinations by the Central Intelligence Agency to withhold in their entirety agency records responsive to a request under the Freedom of Information Act, on the ostensible basis that such records are exempt from disclosure under the statute's Exemption 3 because their release might reveal intelligence sources and methods, are beyond the scope of any judicial review?

2. Whether, in litigation under the Freedom of Information Act, the plaintiff is entitled to be provided an adequate public Index of the responsive documents withheld by the government from release?

3. Whether the segregability requirement of 5 U.S.C. § 552(b) (final sentence) may be ignored by the courts in Freedom of Information Act litigation in which the Central Intelligence Agency invokes the statute's Exemption 3?

4. Whether the Court of Appeals erred in sustaining the Central Intelligence Agency's refusal to disclose any portion of any document responsive to the Petitioner's Freedom of Information Act request, in the face of an admittedly inadequate public record and without any review or analysis of the agency's claims of exemption under the statute's Exemptions 1 and 3?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner John R. Knight respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on August 25, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 872 F.2d 660, and is set forth in the Appendix hereto, at p. A1-A25.

The memorandum decision (Order) of the United States District Court for the Southern District of Texas, Houston Division (McDonald, J.), is not reported. The district court's Order is set forth in the Appendix hereto, at p. B1-B4.

JURISDICTION

The opinion below, and the original judgment of the Court of Appeals, were entered on May 10, 1989. The Petitioner timely filed a Petition for Rehearing, which was denied on August 15, 1989. The final judgment of the Court of Appeals, issued as and for the mandate, was entered on August 25, 1989.

On November 6, 1989, Justice White ordered that the time for filing this petition for writ of certiorari be extended to and including December 4, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Freedom of Information Act, 5 U.S.C. § 552. As permitted by Rule 21.1(f), the pertinent text of the statute (sections (a)(3), (a)(4)(B), (b)(1), (b)(3), and (b)(final sentence)) is set forth in the Appendix hereto, at p. E1-E3.

STATEMENT OF THE CASE

On July 10, 1985, the vessel RAINBOW WARRIOR exploded and sank in the harbor at Auckland, New Zealand. The ship was in New Zealand preparing to sail to the vicinity of Muraroa atoll, to monitor and protest a scheduled French nuclear test. It exploded and sank upon the detonation of explosive charges clandestinely attached to its hull by operatives of one of the French intelligence services. Initially, the French denied any involvement in the matter. In September 1985, however, the French government

publicly admitted full responsibility for the sinking of the ship. A major political scandal ensued, reaching to the senior levels of the French government.

This action was commenced by the Petitioner on September 30, 1986, under the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The jurisdiction of the district court was invoked under 5 U.S.C. § 552(a)(4)(B). By his Complaint for Injunctive Relief, the Petitioner sought to enjoin the Respondent Central Intelligence Agency ("CIA") from continuing to withhold from release to him documents relating to the sinking of the RAINBOW WARRIOR. Such documents were the subject of a FOIA request, dated October 4, 1985, to which the government had never substantively responded.

In due course, the Petitioner moved to require the preparation of an Index of the withheld documents, under the authority of

Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir., 1973), *cert. denied*, 415 U.S. 977 (1974). The CIA thereafter filed two public Declarations, one of which discussed eight responsive "finished intelligence documents," and the other of which obliquely addressed an unstated number of additional responsive documents. These Declarations claimed that the responsive documents were exempt from disclosure in their entirety under FOIA Exemptions 1 and 3, 5 U.S.C. § 552(b)(1) and (3).*/ The Declarations

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*/ Exemption 1 protects from disclosure information that is "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and [is] in fact, properly classified pursuant to such Executive Order." 5 U.S.C. § 552(b)(1). In general, Exemption 3 protects from disclosure information that is specifically exempted from disclosure by another statute. *See* 5 U.S.C. § 552(b)(3). The statute invoked by the CIA under Exemption 3 was section 102(d)(3) of the National Security Act of 1947, codified at 50 U.S.C. § 403(d)(3), which makes the Director of Central Intelligence responsible for protecting "intelligence sources and methods from unauthorized disclosure."

were thereafter repeatedly challenged by the Petitioner as insufficient to constitute an adequate *Vaughn* Index.

The Respondent also requested leave, and subsequently was directed by the magistrate, to file a classified supplemental Declaration for the district court's *in camera, ex parte* review. The responsive documents themselves were denied to the Petitioner in their entirety, for reasons of "national security." They were, however, ordered to be submitted by the Respondent for *in camera* inspection.

The Respondent eventually moved for summary judgment on the basis of its public Declarations. The Petitioner cross-moved for partial summary judgment, noting, *inter alia*, that other agencies of the government had released portions of several documents responsive to his FOIA request; and that the documents so released had been forwarded by the

Respondent for the agencies' handling.*/ In withholding from release only portions of these documents, the other agencies invoked the same "national security" concerns and exemptions that the CIA invoked in denying any disclosure of the responsive documents whatsoever.

On June 30, 1988, the district court entered an Order granting the Respondent's motion for summary judgment and denying the Petitioner's motion for partial summary judgment. In its Order, the district court agreed that the Respondent's public Declarations did not constitute an adequate *Vaughn* Index, because they did not describe the withheld documents with sufficient particularity and did not describe how they affected national security. Accordingly, the withheld documents were reviewed by the

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*/ The other agencies were the State Department and the Defense Intelligence Agency. See Appendix, at p. A6-A7.

district court *in camera*. After so doing, the district court held that the documents at issue "were properly withheld and that [the Petitioner was] not entitled to them." Appendix, p. B4. No further explanation of the decision was provided. As the Court of Appeals later surmised, however, the district court's decision was premised "presumably, although not explicitly, on the basis that the documents were properly exempted from disclosure under § 552(b)(1) and (3) of the FOIA." *Id.*, at p. A10.

The Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, raising a variety of substantive and procedural issues. A panel of the Fifth Circuit affirmed the judgment of the district court, on the basis that the withheld documents were protected from mandatory disclosure by FOIA Exemption 3. In so holding, the Court of Appeals did

not address at all the Respondent's invocation of FOIA Exemption 1, and expressly declined to reach any of the Petitioner's arguments, either procedural or substantive. See Appendix, p. A13.

Instead, the Court of Appeals proceeded by posing, as a "threshold issue," the question of whether or not it could review the Respondent's invocation of FOIA Exemption 3. Relying on its reading of this Court's decision in *CIA v. Sims*, 471 U.S. 159 (1985), the Court of Appeals perceived the answer to its question to be in the negative. As explained by the Fifth Circuit:

> In our view, *Sims* stands for the proposition that because 50 U.S.C. § 403(d)(3) is a withholding statute under the FOIA (5 U.S.C. § 552(b)(3)(B)), the FOIA simply does not apply to material the [Director of Central Intelligence] specifically has exempted on the ground that it pertains to or could give rise to inferences about intelligence sources and methods. Thus, under *Sims*, it is sufficient that the DCI has determined, within the discretion given

> him by 50 U.S.C. § 403(d)(3), that each of the classified documents sought could reveal intelligence sources and methods and thus must be protected. Once the DCI makes that determination, the Supreme Court effectively held, the matter is beyond the purview of the courts.

Appendix, p. A21. The one apparent exception to this principle of judicial unreviewability in this context--the existence of bad faith on the part of the government--was found by the Court of Appeals not to have been demonstrated by the Petitioner. Thus, the Fifth Circuit determined that it could not review the Respondent's invocation of Exemption 3 in response to the Petitioner's FOIA request because "the matter [was] beyond the purview of the courts." Finally, the Court of Appeals either assumed, or concluded, *sub silencio*, that the Respondent's unreviewable Exemption 3 determinations applied across the board with respect to each of the responsive docu-

ments withheld from release. Accordingly, the judgment of the district court was affirmed, essentially on the premise that the CIA's claims of exemption were beyond the scope of judicial review.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S HOLDING THAT EXEMPTION 3 DETERMINATIONS BY THE CIA ARE NOT JUDICIALLY REVIEWABLE IS INCONSISTENT WITH 5 U.S.C. § 552(a)(4)(B) AND CONFLICTS, DIRECTLY OR IN PRINCIPLE, WITH DECISIONS OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The FOIA requires every federal agency to disclose agency records upon a proper request, unless they may be withheld pursuant to one of nine enumerated exemptions. 5 U.S.C. § 552(a)(3). *Department of Justice v. Julian*, 486 U.S. 1, 108 S.Ct. 1606, 100 L.Ed.2d 1, 11 (1988). *See also, Goldberg v. U.S. Department of State*, 818 F.2d 71, 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. __, 108 S.Ct. 1075, 99 L.Ed.2d 234 (1988).

The statute expressly grants the district courts jurisdiction to order the production of records improperly withheld. The statute further directs the district courts to determine such matters de novo, and expressly places the burden on the agency to sustain its actions. 5 U.S.C. § 552(a)(4)(B). *See, e.g., United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. __, 109 S.Ct. 1468, 103 L.Ed.2d 774, 784 (1989). Thus, all agency claims of exemption--including those made by the CIA under Exemption 3--are subject under the FOIA to de novo judicial review in the district courts. These decisions, in turn, necessarily are subject to at least some form of appellate review. Thus, the Fifth Circuit's holding that the CIA's Exemption 3 determinations are "beyond the purview of the courts" is inconsistent with the provisions of § 552(a)(4)(B).

The decision below also conflicts, directly or in principle, with several decisions of the United States Court of Appeals for the District of Columbia. That court has long recognized that the CIA's invocations of Exemption 3 are subject to judicial review under the FOIA. Indeed, any number of such cases have been the subject of vigorous and protracted litigation. *See, e.g., Miller v. Casey*, 730 F.2d 773 (D.C. Cir. 1984); *Paisley v. Central Intelligence Agency*, 712 F.2d 686 (D.C. Cir. 1983), *vacated in part*, 724 F.2d 201 (D.C. Cir. 1984); *McGehee v. Central Intelligence Agency*, 697 F.2d 1095, 1112-13 (D.C. Cir. 1983); *on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983); *Military Audit Project v. Casey*, 656 F.2d 724 (D.C. Cir. 1981); *Allen v. Central Intelligence Agency*, 636 F.2d 1287 (D.C. Cir. 1980); *Phillippi v. Central Intelligence Agency*, 546 F.2d 1009 (D.C. Cir. 1976). As these cases dramatically illustrate, the D.C. Circuit

does not subscribe to the view that the CIA's Exemption 3 claims are "beyond the purview of the courts."

The decision below further conflicts with decisions of the D.C. Circuit as to the manner in which the CIA may meet its statutory burden of sustaining its claims of exemption. In this case, the Fifth Circuit treated the CIA's Exemption 3 claims as unreviewable, and accorded the agency's public Declarations absolute deference. Thus, despite the district court's express finding that those Declarations were inadequate as a *Vaughn* Index, because they did not sufficiently describe either the withheld documents or how they affected national security, the Court of Appeals accepted the CIA's Exemption 3 claims without question. It undertook no analysis or review of those claims, did not review the withheld documents *in camera*, and declined to

consider any of the Petitioner's arguments. Essentially, the CIA was found to have met its statutory burden of proof simply by making the very claims that it had the burden of proving.

Under the decisions of the D.C. Circuit, the CIA does not meet its burden of proof simply by raising claims of exemption. Instead, it must prepare substantive and reasonably specific affidavits that are neither controverted by contrary record evidence, nor impugned by evidence of bad faith. *See, e.g., Goldberg v. U.S. Department of State, supra*, at 77-78; *Military Audit Project v. Casey, supra*, at 738; *Allen v. Central Intelligence Agency, supra*, at 1291. Moreover, the provision of a public record to the maximum extent possible is an absolute requirement in all FOIA cases in the D.C. Circuit. *See, e.g., King v. United States Department of Justice*, 830 F.2d 210, 218-19 (D.C. Cir. 1987); *Lykins v. United States*

Department of Justice, 725 F.2d 1455, 1463 (D.C. Cir. 1984). In short, the D.C. Circuit employs a well-established procedure that places upon the agencies--including the CIA--a number of substantive requirements, and permits the plaintiff to participate in the litigation in something of an adversarial fashion. If the CIA fails to satisfy any one of those requirements, its statutory burden of proof is not met.

For at least these reasons, therefore, the decision below is in conflict with many decisions of the D.C. Circuit. This conflict reflects fundamentally inconsistent approaches not only to litigation under Exemption 3, but also to FOIA litigation in general. The conflict is exacerbated by the fact that the Fifth Circuit's decision is inconsistent with the provisions of the FOIA itself. The conflict could not be more complete. It

deserves this Court's consideration so that the lower courts may be properly guided.

II.

THE FIFTH CIRCUIT'S DECISION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW.

The decision below raises serious questions concerning the future application of the FOIA to the CIA. Under the analysis advanced by the Fifth Circuit, the CIA will automatically prevail in FOIA litigation simply by invoking Exemption 3. The result, as this case vividly illustrates, is that the broad disclosure mandated by the statute will be displaced by total nondisclosure on the strength of unreviewable Exemption 3 claims.

In effect, under the decision of the Court of Appeals, the CIA can unilaterally exempt itself from the FOIA's disclosure provisions, and its actions are not reviewable by the courts. So, too,

apparently, may the agency exempt itself with impunity from the statute's segregability provisions, 5 U.S.C. § 552(b) (final sentence). For these reasons, the decision below calls into question the future efficacy of the FOIA as applied to the CIA. This is an important question of federal law, fully deserving of plenary consideration by this Court.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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John R. KNIGHT, Plaintiff-Appellant,

v.

UNITED STATES CENTRAL INTELLIGENCE AGENCY, Defendant-Appellee.

No. 88-2735.

United States Court of Appeals, Fifth Circuit

May 10, 1989.

[SUMMARY]

Freedom of Information Act request was made for CIA documents relating to 1985 sinking of vessel belonging to environmental and pacifist organization by French government. On cross motions for summary judgment, the United States District Court for the Southern District of Texas at Houston, Gabrielle K. McDonald, J., granted CIA's motion. On appeal, the Court of Appeals, E. Grady Jolly, Circuit Judge, held that when Director of Central Intelligence made judgment that documents could reveal intelligence sources and methods and thus had to be protected from

FOIA disclosure, courts could not, absent evidence of bad faith, effectively go behind that judgment and order Director to produce what he had determined to be exempt for reasons of national security.

Affirmed.

Records †56, 63

Once Director of Central Intelligence made judgment that documents concerning 1985 sinking of vessel belonging to environmental and pacifist organization could reveal intelligence sources and methods and were thus protected from Freedom of Information Act disclosure, court could not, absent evidence of bad faith, effectively go behind judgment and order Director to produce what he had determined to be exempt for reasons of national security. 5 U.S.C.A. § 552(b)(3)(B); National Security Act of 1947, § 102(d)(3), 50 U.S.C.A. § 403(d)(3).

[OPINION]

Appeal from the United States District Court for the Southern District of Texas.

Before GARZA, JOLLY and JONES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Pursuant to a Freedom of Information Act ("FOIA") request, John R. Knight sought from the CIA classified material relating to the sinking of the GREENPEACE vessel RAINBOW WARRIOR in the harbor of Auckland, New Zealand, on July 10, 1985. Because in *CIA v. Sims*, 471 U.S. 159, 105 S.Ct. 1881, 85 L.Ed.2d 173 (1985), the Supreme Court held that 50 U.S.C. § 403(d)(3) is a withholding statute empowering the Director of Central Intelligence ("DCI") to exempt from FOIA disclosure material that could compromise intelligence sources and methods, and since the DCI withheld the documents

sought specifically on that basis, we affirm the district court's grant of summary judgment in favor of the CIA.

I

This lawsuit concerns Knight's FOIA request, dated October 4, 1985, which requested from the CIA five categories of documents relating to the sinking of the GREENPEACE vessel RAINBOW WARRIOR. The vessel exploded and sank in the harbor at Auckland, New Zealand, on July 10, 1985. This incident was widely reported when it occurred, and sparked international controversy when it was discovered that the explosion was caused by the detonation of explosive charges attached to the ship's hull.

GREENPEACE is a well-known international organization that pursues a variety of environmental and pacifist causes. The organization has been noted for its efforts to save marine wildlife,

and to stop the testing and development of nuclear weapons, among other causes. At the time it was sunk, the RAINBOW WARRIOR was in New Zealand preparing to sail to the vicinity of Muraroa atoll in French Polynesia to monitor and protest a scheduled French nuclear test. The French government denied any official involvement in the incident and denials of responsibility for the sinking of the vessel continued into September 1985. On September 22, 1985, however, the French prime minister publicly admitted that the two French intelligence agents had been responsible for the sinking of the RAINBOW WARRIOR, and that they had been acting under orders in so doing. It was further disclosed that the initial French official investigation into the affair had been less than candid, and that the responsibility for having ordered the attack rested within very senior levels of

the French government. As a result of these revelations, both the Minister of Defense and the director of the French intelligence service responsible were replaced. Thus, the time Knight filed his FOIA request with the CIA on October 4, 1985, the French government had admitted full culpability in, and responsibility for, the sinking of the RAINBOW WARRIOR.

The CIA, however, refused to release any portion of any document related to the incident to Knight, pursuant to his FOIA request, on grounds that the documents were important to Untied States national security. Other agencies of the government, however, did release documents responsive to Knight's request. Specifically, by correspondence dated November 25, 1986, the Defense Intelligence Agency ("DIA") released to Knight portions of three responsive documents that had been forwarded to it for review and handling by

the CIA; and by correspondence dated September 1, 1987, the State Department released to Knight most of one responsive document that had been similarly forwarded by the CIA. In withholding from release only portions of their documents responsive to Knight's FOIA request, the DIA and the State Department invoked the same "national security" exemption that the CIA invoked in denying any disclosure or responsive documents whatsoever.

The CIA continues to refuse to release any document or any portion of any document in response to Knight's FOIA request.

II

Against this background has occurred the procedural maneuvering that provides the essence of this litigation. First, of course, Knight filed his FOIA request seeking access to all documents relating to the sinking of the RAINBOW WARRIOR.

After the CIA informed Knight that it could release no documents, Knight moved the district court to compel preparation of a *Vaughn* index, so-called because in *Vaughn v. Rosen*, 484 F.2d 82 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), the D.C. Circuit required a government agency to formulate a system of itemizing and indexing that would correlate each document or part of a document the agency sought to withhold with the specific justification for withholding it.

In response, the defendant CIA agreed to file a *Vaughn* index and did file affidavits (the "Saderholm and Dyer declarations"), which supplied justifications for withholding the documents. The Saderholm declaration discussed eight "finished intelligence documents" responsive to Knight's FOIA request, while the Dyer declaration addressed an unstated

number of additional responsive documents. The documents themselves were not disclosed to Knight. The CIA also requested permission to prepare and present to the court for its *ex parte, in camera* review a classified declaration (the "Carle declaration") which it assured would further describe the documents requested and therefore assist the court in determining whether they were correctly withheld. The magistrate entered an order directing the CIA to prepare such a classified supplemental *Vaughn* index and the CIA did so.

After the CIA moved for summary judgment, alleging that its unclassified affidavits entitled it to judgment as a matter of law, Knight moved for partial summary judgment, alleging that the unclassified affidavits were inadequate for the *Vaughn* index and that, in any case, he was entitled to judgment as a

matter of law because the CIA could not claim legitimately that the documents were exempt from disclosure under the FOIA. The district court agreed that the Saderholm and Dyer declarations constituted an inadequate *Vaughn* index because they did not describe with sufficient particularity the documents that were withheld nor did they describe how they affected national security. The district court therefore reviewed the documents *in camera* to determine whether the information was properly withheld. After reviewing the documents, the district court decided that they were properly withheld, presumably, although not explicitly, on the basis that the documents were properly exempted from disclosure under § 552(b)(1) and (3) of the FOIA. The district court therefore granted the CIA's motion for summary judgment and denied Knight's motion for

partial summary judgment. Knight appeals that ruling.

III

Knight contends that in granting summary judgment in the CIA's favor on an admittedly inadequate public record, and without explanation, the district court erred in at least four ways.

First, Knight argues that the court should not have permitted the CIA to litigate this matter on the basis of an inadequate public record. As a result, Knight contends he was denied a meaningful opportunity to participate in this litigation effectively.

Second, Knight argues that the CIA's assertion that national security concerns were implicated defies common sense and appears wholly at odds with the standards that govern the exemptions invoked.

Third, Knight asserts the district court failed to address whether portions of the documents at issue were segregable and therefore required to be released pursuant to his FOIA request.

Finally, Knight maintains that the district court erred in granting summary judgment because there remained in dispute a genuine issue of material fact as to the responsive documents not tendered for *in camera* review by the National Security Council. The government, he says, initially admitted the existence of such documents, but then repudiated its admission in an *ex parte* contact with the court. Whether these additional responsive documents exist is a material issue of fact about which there was a clear dispute and granting summary judgment was therefore inappropriate.

IV

Notwithstanding Knight's statement of the issues, we must confront a threshold issue: that is, whether, when the DCI makes a judgment that documents could reveal intelligence sources and methods, the courts may, in the absence of evidence of bad faith, effectively go behind that judgment and order him to produce what he has determined to be exempt for reasons of national security. Because we perceive the answer to be in the negative, we need go no further.

V

The Supreme Court's decision in *CIA v. Sims*, 471 U.S. 159, 105 S.Ct. 1881, 85 L.Ed.2d 173 (1985), controls our decision today. As the Supreme Court noted in *Sims*, section 102(d)(3) of the National Security Act of 1947, codified at 50 U.S.C. § 403(d)(3), makes the DCI "responsible for protecting *intelligence*

sources and methods from unauthorized disclosure." (Emphasis supplied.) The *Sims* Court considered whether this statute requiring the DCI to protect intelligence sources and methods qualified as a withholding statute under 5 U.S.C. § 552(b)(3)(B), one of the specific FOIA exemptions, and thus rendered the material protected pursuant thereto exempt from FOIA disclosure. Section 552(b)(3) in relevant part reads as follows:

> (b) [The general FOIA disclosure requirement] *does not apply* to matters that are--
>
> . . . .
>
> (3) *specifically exempted from disclosure by statute* (other than section 552(b) of this title), *provided that such statute* . . . (B) establishes particular criteria for withholding or *refers to particular types of matters to be withheld*; (emphasis added).

The Supreme Court concluded that 50 U.S.C. § 403(d)(3) does qualify as a withholding statute under the language of 5 U.S.C. § 552(b)(3)(B), because section 403(d)(3) requires the DCI to protect certain material from unauthorized disclosure, and it refers to "particular types of matters to be withheld," namely "intelligence sources and methods."

Having established the principle, the Court then turned to the specific question whether the names of institutions and individuals who performed research on a project financed by the CIA were exempt from FOIA disclosure because the DCI asserted that disclosing the names might reveal intelligence sources and methods. The Court observed that when Congress in section 403(d)(3) imposed upon the DCI the responsibility to protect intelligence sources and materials, it also conferred upon him "wide-ranging authority" to

protect sources and methods. *Id.* 471 U.S. at 177, 105 S.Ct. at 1892 (quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3, 100 S.Ct. 763, 765 n.3, 62 L.Ed.2d 704 (1980) (per curiam)). Such broad discretion is justified, the Court said, because even the most apparently innocuous sources and prosaic methods can yield valuable intelligence. *Sims*, 471 U.S. at 169-173, 105 S.Ct. at 1888-90. "'[W]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.'" *Id.* at 178, 105 S.Ct. at 1892 (quoting *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978)). Since exposure to public view can compromise and endanger intelligence sources and methods, insuring continued collection of intelligence requires that the DCI be able to decide which of his sources and methods deserve

protection from public view. *Id.*, 471 U.S. at 180, 105 S.Ct. at 1893-94. The Court wrote unequivocally, "[I]t is the responsibility of the Director of Central Intelligence, not of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence gathering process." *Id.* The *Sims* Court thus concluded that the DCI had acted within the broad discretion given him by section 403(d)(3) in withholding the names sought, and that the names were therefore exempt from FOIA disclosure under section 552(b)(3)(B).

Given the Supreme Court's broad holding in *Sims*, we conclude that the CIA must prevail here. In the Saderholm declaration, the CIA's acting information review officer, the DCI's designee, maintains that none of the eight documents

referred to therein can be disclosed because disclosure would compromise sources and methods. Typical of the entries in the Saderholm declaration is the following:

Document No. 2

This one-page document is an excerpt from the cable form of the *East Asia Brief* 85-185. This excerpt contains sensitive, finished foreign intelligence concerning political matters in a particular part of the world. *Knowledgeable individuals could recognize from the specific information provided the possible identity of the source and the methods whereby the information was obtained. See* paragraphs 14-21, above.

I have determined that release of this information reasonably could be expected to cause serious damage to the national security. Therefore information contained in this document

is currently and properly classified at the SECRET level and is exempt from disclosure pursuant to FOIA exemptions (b)(1) and (b)(3) [50 U.S.C. section 403(d)(3) and section 403g]. *See* paragraphs 7-12, above.

(Emphasis supplied.) Paragraphs 14-21 referred to in the first paragraph of the entry explain, in very general terms, why disclosure of this document and the other seven documents listed in the Saderholm declaration could compromise intelligence sources and methods and thus fall within the exemption of 5 U.S.C. § 552(b)(3). Paragraphs 7-12 explain that the documents were properly classified according to an Executive Order and thus do not pertain to our discussion of 5 U.S.C. § 552(b)(3).

In the Dyer declaration, the Agency's information review officer, the DCI's permanent designee, attests that he has found additional relevant documents but

that their disclosure could injure intelligence collection capabilities by compromising sources and methods. That document reads in relevant part as follows:

> 4. . . . After careful consideration and for the reasons set forth below, I have personally determined that the public disclosure of the precise number and dates of these remaining documents could reasonably be expected to cause damage to the national security. Accordingly, I cannot provide a listing or description of these documents on the public record. . . . In summary, it is impossible to specify the exact number of other documents without risking the disclosure of United States capabilities and intelligence sources or methods.

Dyer declined to reveal the dates or any further description of the documents for the same reasons.

In our view, *Sims* stands for the proposition that because 50 U.S.C. § 403(d)(3) is a withholding statute under the FOIA (5 U.S.C. § 552(b)(3)(B)), the FOIA simply does not apply to material the DCI specifically has exempted on the ground that it pertains to or could give rise to inferences about intelligence sources and methods. Thus, under *Sims*, it is sufficient that the DCI has determined, within the discretion given him by 50 U.S.C. § 403(d)(3), that each of the classified documents sought could reveal intelligence sources and methods and thus must be protected. Once the DCI makes that determination, the Supreme Court effectively held, the matter is beyond the purview of the courts. "The decisions of the [DCI], who must, of course, be

familiar with the whole picture, as judges are not, are worthy of great deference given the magnitude of the national security interests and the potential risks at stake." *Sims*, 471 U.S. at 179, 105 S.Ct. at 1893. We as a court are unwilling to second guess the DCI or his designees on these matters in the absence of evidence of bad faith.

We should observe that in this case there is no evidence of, or even an explicit allegation of, bad faith. However, to the extent that it is suggested that the allegedly overbroad or far-fetched justification for withholding these documents is evidence of bad faith, we view that as no more than an extended exercise of the CIA's broad discretion acknowledged by the Supreme Court in *Sims*, not as bad faith. As we have already noted, what may seem overbroad or even trivial to us "may appear of great moment

to one who has a broad view of the scene and may put the questioned item of information in its proper context." *Id.*, 471 U.S. at 178, 105 S.Ct. at 1892 (citations omitted). Second, with regard to the CIA's insistence on withholding documents when the State Department and the DIA released documents pertaining to the same subject, we do not believe that the DCI abuses his broad discretion in making a judgment different from that of other agencies in government. He, and not the DIA or the State Department, is entrusted with the final responsibility for protecting intelligence sources and methods, and consequently he is fully entitled, within his discretion, to reach a different conclusion as to national security significance concerning the same document. Finally, we are not persuaded that the CIA acted in bad faith when it "initially admitted the existence of

[responsive National Security Council] documents, but then repudiated its admission in an *ex parte* contact with the court." This matter was clearly before the district court, and the district court obviously credited the CIA's assertion that it had made a "simple misstatement." There is nothing in the record before us that would suggest that the district court was clearly erroneous in this conclusion.

VI

In conclusion, we hold that the documents are exempt from FOIA disclosure. This is so because the DCI determined, with full authority to do so, that the release of the documents could compromise intelligence sources and methods. In the absence of bad faith, or some other compelling showing that he has abused his broad discretion, his determination may not be second-guessed by the courts.

There is no such evidence here. The judgment of the district court is therefore

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN R. KNIGHT, Plaintiff, v. UNITED STATES CENTRAL INTELLIGENCE AGENCY, Defendant.	CIVIL ACTION NO. H-86-3766

ORDER

Pending before the Court is Defendant's Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment. After considering the arguments and the applicable law, the Court is of the opinion that the Defendant's Motion for Summary Judgment is GRANTED and Plaintiff's Motion for Partial Summary Judgment is DENIED.

Plaintiff filed a Freedom of Information Act (FOIA) request seeking access to all documents relating to the sinking of the Greenpeace vessel "Rainbow Warrior" in

the Harbor of Auchland, New Zealand. After being informed that no documents could be released to him, Plaintiff filed a Motion to Compel Preparation of a Vaughn Index. The Defendant filed a response by way of affidavits, which supplied justifications for withholding the finished intelligence documents in response to Plaintiff's FOIA request. Also, Defendant requested permission to prepare and present to the Court a classified declaration for court's ex parte in camera review which would contain further description of documents requested and would enable the Court to determine if withholding of documents was proper. Magistrate Brown entered an order directing the CIA to prepare a classified supplemental Vaughn Index discussing the documents in Dyer Declaration for the Court's ex parte, in camera review. Defendant then filed a Motion for Summary

Judgment alleging that the affidavits filed by Defendants are sufficient to entitle it to a judgment as a matter of law. Plaintiff then filed a Motion for Partial Summary Judgment alleging that the affidavits are insufficient to constitute an adequate Vaughn Index and Plaintiff is entitled to judgment as a matter of law because the FOIA exemptions claimed have not been properly invoked. The Court determined that the Saderholm and Dyer Declarations were inadequate, because they did not describe which documents were withheld and how they affected National Security. For those reasons, the Court reviewed the documents in camera to determine whether the information was property withheld. After thoroughly reviewing the documents, the exemptions claimed, and the explanations for how National Security could be affected, the Court is of the opinion that such docu-

ments were properly withheld and that Plaintiff is not entitled to them. It is therefore,

ORDERED, ADJUDGED, and DECREED that Defendant's Motion for Summary Judgment is GRANTED and Plaintiff's Motion for Partial Summary Judgment is DENIED.

The Clerk shall file this Order and provide a true copy to counsel for all parties.

DONE at Houston, Texas this 30 day of June, 1988.

/s/
GABRIELLE K. McDONALD
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2735

D.C. Docket No. CA-H-86-3766

JOHN R. KNIGHT,

Plaintiff-Appellant,

versus

UNITED STATES CENTRAL
INTELLIGENCE AGENCY,

Defendant-Appellee.

Appeal from the United States District
Court for the Southern District of Texas

Before GARZA, JOLLY and JONES, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

May 10, 1989

ISSUED AS MANDATE: AUG 25 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2735

JOHN R. KNIGHT,

Plaintiff-Appellant,

versus

UNITED STATES CENTRAL
INTELLIGENCE AGENCY,

Defendant-Appellee.

Appeal from the United States District
Court for the Southern District of Texas

ON PETITION FOR REHEARING

(August 15, 1989)

Before GARZA, JOLLY and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

STATUTE INVOLVED

5 U.S.C. § 552. Public information; agency rules, opinions, orders, records and proceedings

(a) Each agency shall make available to the public information as follows:

* * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * *

(4) (A) . . . .

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which

the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exceptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * *

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact

properly classified pursuant to such Executive order;

* * *

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

* * *

Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

* * *

Supreme Court, U.S.
FILED
FEB 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-878

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN R. KNIGHT, PETITIONER

v.

UNITED STATES CENTRAL INTELLIGENCE AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the determination by the Director of Central Intelligence, under his authority to "protect[ ] intelligence sources and methods from unauthorized disclosure," 50 U.S.C. 403(d)(3), not to disclose certain records under the Freedom of Information Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-878

JOHN R. KNIGHT, PETITIONER

v.

UNITED STATES CENTRAL INTELLIGENCE AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 872 F.2d 660. The order of the district court (Pet. App. B1-B4) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C1-C2) was entered on May 10, 1989. A petition for rehearing was denied on August 15, 1989 (Pet. App. D1). On November 6, 1989, Justice White extended the time within which to petition for writ of certiorari to and including December 4, 1989, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner seeks disclosure, under the Freedom of Information Act (FOIA), 5 U.S.C. 552, of certain records of the Central Intelligence Agency relating to the sinking of the Greenpeace vessel Rainbow Warrior in the harbor of Auckland, New Zealand, on July 10, 1985. The Rainbow Warrior had been preparing to monitor and protest a scheduled nuclear weapons test to be conducted by France. On September 22, 1985, the prime minister of France publicly admitted that two French intelligence agents, acting under orders from senior levels of the French government, had been responsible for the sinking of the vessel. Pet. App. A4-A6.

On October 4, 1985, petitioner sought disclosure under FOIA of all documents in the possession of the CIA that dealt with the Rainbow Warrior incident. Pet. App. B1-B2. The CIA informed petitioner that it could not disclose any documents, or any portions of documents. Pet. App. A7-A8.[1] Petitioner then moved under *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), to compel the CIA to file public affidavits, indexing the contents of the documents and explaining the reasons for their withholding. The CIA filed two *Vaughn* affidavits, one of which discussed eight documents and the other one of which discussed an unstated number of additional documents. The CIA also submitted an affidavit which contained classified

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[1] The CIA forwarded three documents to the Defense Intelligence Agency, which disclosed some portions and withheld others. The CIA also forwarded another document to the Department of State, which also disclosed some portions and withheld others. The two agencies justified the withholdings under Exemption 1 of the FOIA, 5 U.S.C. 552(b)(1), which exempts from mandatory disclosure matters that are properly classified in the interest of national defense or foreign policy. Pet. App. A6-A7. Petitioner does not challenge these withholdings.

information for *ex parte in camera* review by the district court in order to explain more fully the justifications for withholding the documents. Pet. App. A8-A9. The CIA then moved for summary judgment, arguing that the documents were exempt from disclosure in their entireties under two alternative grounds. First, the CIA argued that the documents were properly classified for national defense and foreign policy reasons, and thus came within FOIA's Exemption 1, 5 U.S.C. 552(b)(1). Second, the Agency argued that the documents came within Exemption 3, 5 U.S.C. 552(b)(3), which excludes from coverage by FOIA "matters that are * * * specifically exempted from disclosure by statute," because the Director of Central Intelligence (Director or DCI) has determined that the documents should not be disclosed, pursuant to his statutory "responsib[ility] for protecting intelligence sources and methods from unauthorized disclosure." 50 U.S.C. 403(d)(3). The CIA maintained that the district court could uphold these exemption claims based on the public affidavits alone, but that if it concluded that it could not do so, it should uphold the exemption claims based on the *in camera* submissions.

2. The district court concluded that the public affidavits were not adequate, standing alone, to justify the exemption claims. Pet. App. B3-B4. It thus turned to the *in camera* affidavit, as well as the documents themselves, which the CIA had also submitted for *ex parte in camera* review. *Ibid.* After "thoroughly reviewing" these materials, the district court concluded that the documents were properly withheld and that the petitioner was not entitled to them.[2] Pet. App. B3-B4. The court thus granted summary judgment for the CIA. Pet. App. B4.

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[2] The district court in its order did not explicitly state that it based its decision on the *in camera* affidavit, but it noted that the CIA had filed that affidavit, that the public affidavits were inadequate, and that

3. The court of appeals affirmed. Pet. App. A1-A25. Relying on this Court's decision in *CIA* v. *Sims*, 471 U.S. 159 (1985), the court of appeals determined that it could not "second-guess[ ]" the DCI's judgment that documents could reveal intelligence sources and methods, in the absence of bad faith or some other compelling showing that the Director had erred. Pet. App. A13, A24.

The court of appeals noted first that this Court in *Sims* established that 50 U.S.C. 403(d)(3) qualifies as a withholding statute under Exemption 3.[3] Pet. App. A15. The appeals court also observed that *Sims* made clear that the Director has " 'wide-ranging authority' to protect sources and methods." Pet. App. A15-A16 (quoting *Sims*, 471 U.S. at 177). Echoing this Court, the appeals court concluded, "[I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." Pet. App. A17 (quoting *Sims*, 471 U.S. at 180).

The court then turned to a detailed discussion of the two publicly filed affidavits, which set forth the specific findings by the CIA of the danger to intelligence sources and methods from any disclosure. Pet. App. A17-A21. The court emphasized as typical the statement about one document in one of the affidavits that "This excerpt contains sensitive, finished foreign intelligence concerning political matters in a particular part of the world. *Knowledgeable individuals could recognize from the specific information provided the*

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it based its decision on "reviewing the documents, the exemptions claimed, and the explanations for how National Security could be affected." Pet. App. B2-B3. This latter remark would thus appear to be a reference to the *in camera* affidavit.

[3] Petitioner does not challenge this ruling.

possible identity of the source and the methods whereby the information was obtained." Pet. App. A18 (quoting Saderholm Declaration). Applying the reasoning set out in *Sims* to these affidavits, the court concluded that once the Director had made a determination that classified documents "could reveal intelligence sources and methods and thus must be protected," the court would not second-guess his determination "[i]n the absence of bad faith, or some other compelling showing that [the Director] has abused his broad discretion." Pet. App. A21, A24.[4] Accordingly, the court upheld the exemptions on the basis of Section 403(d)(3) alone, without having to reach the question whether the documents were also exempt under Exemption 1.[5]

ARGUMENT

The court of appeals reviewed and properly disposed of the factual dispute at issue here. Its holding is fully in compliance with this Court's recent decision in *Sims*. Contrary to petitioner's contention, there is no current conflict with the decisions of the District of Columbia Circuit. Further review is therefore unwarranted.

1. This Court in *Sims* held that the Director's authority "to protect all sources of intelligence information from disclosure" under 50 U.S.C. 403(d)(3) is "very broad." 471 U.S. at 168-169. The Court emphasized that the plain

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[4] The court of appeals found "no evidence of, or even an explicit allegation of, bad faith," and it rejected possible implications of bad faith. Pet. App. A22-A24. Petitioner does not appear to challenge this holding.

[5] The CIA did not claim Exemption 1 for any portion of any document for which it did not also claim Exemption 3. Thus, by upholding the Exemption 3 claim in full, the court disposed of the entire case without reaching Exemption 1.

language of the statute made clear "the express intention of Congress" to grant the CIA "sweeping power" to protect its intelligence sources and methods: "The 'plain meaning' of [Section 403(d)(3)] may not be squared with any limiting definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence." *Sims*, 471 U.S. at 169. The Court in turn ruled that the legislative history of Section 403(d)(3) confirmed the "broad power" that Congress gave the Agency to control disclosure of intelligence sources. See 471 U.S. at 170-173.

Thus, this Court recognized that the protection afforded by Section 403(d)(3) is not limited to "confidential or nonpublic intelligence sources." *Sims*, 471 U.S. at 169; see also *id.* at 174-177. Rather, it covers a wide variety of individuals and data. Within the first group are all "persons [who] provided, or were engaged to provide, information the Agency needs to fulfill its statutory obligations with respect to foreign intelligence." *Id.* at 174. In addition, the Director can rely on Section 403(d)(3) to withhold "superficially innocuous information" on the ground that it might enable an observer to identify an intelligence source. 471 U.S. at 178.[6]

The CIA must be able to "tender as absolute an assurance of confidentiality as it possibly can." *Sims*, 471 U.S. at 175. "We seriously doubt," the Court noted, "whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only

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[6] As the Court concluded, "bits and pieces of data 'may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.' " *CIA* v. *Sims*, 471 U.S. 159, 178 (1985) (quoting *Halperin* v. *CIA*, 629 F.2d 144, 150 (D.C. Cir. 1980)).

after examining the facts of the case to determine whether the Agency actually needed to promise confidentiality in order to obtain the information." *Id.* at 176. In addition, the Court noted that "the mere explanation" of why information must be withheld could convey valuable information to those gathering foreign intelligence. *Id.* at 179. Thus, in a passage that the court of appeals quoted and relied upon (Pet. App. A17), this Court ruled that "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." 471 U.S. at 180. "The decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference," the Court concluded, "given the magnitude of the national security interests and potential risks at stake." *Id.* at 179.

In the wake of this sweeping language, the court of appeals was entirely correct when it held that the role of the courts in reviewing a claim of exemption under Section 403(d)(3) is limited. The court of appeals carefully established, as did this Court in *Sims*, that the Director had determined that each of the classified documents sought could reveal intelligence sources and methods and thus had to be protected. See Pet. App. A21; see also *id.* at A17-A20 (reviewing justifications in public affidavits given for nondisclosure). The court further established that there was no evidence of bad faith, or any other specific and compelling evidence that brought into serious question the judgment of the Director. Beyond that, the court of appeals properly concluded that petitioner's challenge to the judgment of the Director and his designees concerning the dangers of disclosure must fail, because any such challenge calls on the courts to second-guess the Director on matters of foreign intelligence, an area beyond the competence of the courts.

See Pet. App. A21-A22. Petitioner does not suggest what function he wishes the courts to serve in this case, other than to indulge in such second guesses. The court of appeals recognized that *Sims* confirmed the broad discretion exercised by the Director; the court therefore properly upheld the Director's decision not to disclose the requested documents.[7] Pet. App. A24-A25.

2. Petitioner nevertheless contends (Pet. 13) that the decision of the court of appeals is in conflict with several decisions of the D.C. Circuit, which has made the CIA's claims under Exemption 3 "the subject of vigorous and protracted litigation." Assuming for the sake of argument that petitioner is correct in so characterizing these D.C. Circuit cases, all of the cases he cites predate this Court's decision in *Sims*. Those cases give no clue as to whether or to what degree the D.C. Circuit would still adhere to any previous decisions which placed more significant substantive or procedural limits on the Director's power to invoke Section 403(d)(3). Indeed, *Sims* itself overturned a D.C. Circuit

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[7] Contrary to petitioner's contention (Pet. 11-12), the decision of the court of appeals is not in conflict with the requirement of 5 U.S.C. 552(a)(4)(B) that the district courts decide claims of exemption under the FOIA de novo. This Court in *Sims* made clear that the district courts' determinations of exemption must take into account the authority granted the Director under 50 U.S.C. 403(d)(3). See *Sims*, 471 U.S. at 174-175, 179. For the same reason, there is no conflict over the need to make an adequate public record (Pet. 15) or to segregate exempt from non-exempt portions of the documents (Pet. 18). The court of appeals found on the facts of this specific case that the public record was as full as necessary (it was supplemented, in any event, with a detailed *in camera* record) to confirm that the CIA met the limited standard set in *Sims* for establishing that documents are exempt from disclosure under Section 403(d)(3). Similarly, no portions of the documents were outside the scope of the exemption, so no such portions needed to be segregated from exempt portions.

decision that had imposed a substantive limitation on the scope of Section 403(d)(3).

In the five years since this Court handed down its decision in *Sims*, the D.C. Circuit has not spoken on the application of Section 403(d)(3).[8] But at least three district court decisions in the D.C. Circuit have interpreted *Sims* as imposing a highly deferential rule like the one applied by the court of appeals below. See *Fitzgibbon* v. *CIA*, Civil Action Nos. 79-0956 and 86-1885 (D.D.C. May 19, 1989), appeal pending, Nos. 89-5213 and 89-5214 (D.C. Cir.); *Allen* v. *Department of Defense*, 658 F. Supp. 15, 19-21 (D.D.C. 1986) (upholding CIA's claims under both Exemption 1 and Exemption 3 based on broad standard of *Sims*); *United States Student Ass'n* v. *CIA*, 620 F. Supp. 565, 570-571 (D.D.C. 1985). The district courts in the D.C. Circuit thus do not believe that any arguably more stringent standard in the decisions of the D.C. Circuit survived *Sims*.

In any event, petitioner exaggerates the degree to which the D.C. Circuit required the courts to challenge the judgment of the Director under Section 403(d)(3) prior to *Sims*. This Court in *Sims* quoted from or cited (471 U.S. at 178-179) several decisions of the D.C. Circuit that granted broad deference to the Director in applying Section 403(d)(3). See *Gardels* v. *CIA*, 689 F.2d 1100 (D.C. Cir. 1982); *Halperin* v. *CIA*, 629 F.2d 144 (D.C. Cir. 1980); see also *Halkin* v. *Helms*, 598 F.2d 1 (D.C. Cir. 1978) (invocation of state secrets privilege by Secretary of Defense). And the pre-*Sims* cases cited by petitioner give no reason to think that the D.C. Circuit would reach any different conclusion

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[8] The lack of reported decisions in that time span is itself notable, given the frequency with which the D.C. Circuit had decided CIA cases in the years previous to *Sims*. It suggests that the courts and litigants have largely accepted *Sims* as dampening particularly "vigorous and protracted litigation" in this field. Pet. 13.

concerning the Director's exercise of discretion in this case than did the court of appeals below.[9] Finally, the D.C. Circuit, both before and after *Sims*, has agreed that summary judgment could be granted on the basis of agency affidavits, if they contained "reasonable specificity of detail" and were not called into question by contrary evidence or evidence of bad faith. See, *e.g.*, *Halperin*, 629 F.2d at 148.[10]

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[9] In *Allen* v. *CIA*, 636 F.2d 1287, 1293-1294 (1980), the D.C. Circuit explicitly relied on the reasoning adopted in one of the appeals court's decisions at issue in *Sims*, later declared invalid by this Court. All the other cases cited by petitioner turned on fact-specific determinations that are not at odds with the one made here. See *Miller* v. *Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) (upholding Agency claim under Exemption 3 requiring resolution that gives "substantial weight" to Agency's determinations and "depends less on the content of specific documents" than do other exemptions); *Paisley* v. *CIA*, 712 F.2d 686 (D.C. Cir. 1983) (declining to hold materials exempt from disclosure under Speech or Debate Clause, remanding for consideration of, *inter alia*, claim of exemption under Section 403(d)(3)); *McGehee* v. *CIA*, 697 F.2d 1095, 1112-1113 (D.C. Cir. 1983) (remanding for *in camera* inspection of documents given finding of bad faith on part of CIA); *Military Audit Project* v. *Casey*, 656 F.2d 724 (D.C. Cir. 1981) (affirming summary judgment in favor of Agency on basis of extensive affidavits); *Phillippi* v. *CIA*, 546 F.2d 1009 (D.C. Cir. 1976) (requiring filing of public affidavit justifying exemption on ground of Section 403(d)(3) in as much detail as possible, before recourse to review of *in camera* affidavit by district court).

[10] While the D.C. Circuit labels its standard one for general use in FOIA cases (see, *e.g.*, *King* v. *United States Dep't of Justice*, 830 F.2d 210, 217 (1987) (concerning disclosure under Exemption 1)), it has noted that inquiries concerning claims of exemption under Section 403(d)(3) "depend[ ]less on the content of specific documents than the other exemptions do." *Miller*, 730 F.2d at 777; *Goland* v. *CIA*, 607 F.2d 339, 350 (D.C. Cir. 1979), cert. denied, 445 U.S. 927 (1980). The Fifth Circuit, while neither articulating nor qualifying a standard so explicitly, evidently considered with some care the content of the claims made in the affidavits in this Section 403(d)(3) case, and will decline to accept an agency affidavit called into question by a "compelling show-

Indeed, petitioner does not venture beyond an abstract claim of conflict in the standards set by the circuits to proffer any argument that would have led the D.C. Circuit to question the Director here. Rather, petitioner argued in the court of appeals that, in his own judgment, it did not seem logical that documents in the possession of the CIA concerning the sinking of the Rainbow Warrior could implicate the CIA's foreign intelligence role. See Pet. C.A. Br. 27-28; *id.* at 32. This type of attack is grounded only on speculation. It does not rise to the type of contrary evidence or "compelling showing" that would make the D.C. Circuit or any other circuit question that the Director, not petitioner or the courts, is in the best position to determine issues of foreign intelligence interests. Under such circumstances, the issue presented here does not warrant further review.

Finally, even if the public affidavits had been held insufficient, the district court upheld the Director only after examining the documents themselves *in camera*, as well as the CIA's *ex parte in camera* affidavit. Petitioner has presented no reason to suppose that had the court of appeals felt it necessary to examine the *in camera* documents, it would have come to a different conclusion.

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ing" that the Director has abused his discretion or a showing of bad faith. Pet. App. A24. The approaches of the circuits appear to come to similar ends. Compare the affidavits approved as sufficient in *Goland*, 607 F.2d at 351, with that approved at Pet. App. A18.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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FEBRUARY 1990

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00745